Supreme Court, U. S.
FILED
JAN 31 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1194

REEVES, INC.,

Petitioner,

vs.

TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG and DAVE JOHNSON, members of the South Dakota Cement Commission,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DENNIS M. KIRVEN, of
KIRVEN AND KIRVEN
104 Fort Street
Buffalo, Wyoming 82834
Counsel for Petitioner

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

AUTHORITIES CITED:

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. .....

REEVES, INC.,

Petitioner,

vs.

TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG and DAVE JOHNSON, members of the South Dakota Cement Commission,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit entered on November 7, 1978.

CITATION TO OPINIONS BELOW

The opinion of the United States District Court for the Western Division of the District of South Dakota granting petitioner's Request for Injunctive Relief is unreported. The District Court entered a Restraining Order dated July 21, 1978, disposing of the issues and said Order is printed in Appendix "B" hereto. The opinion of the United States Court of Appeals for the Eighth Circuit is printed in Appendix "A" hereto and is reported as *Reeves, Inc. v. Kelley,* 586 F. 2d 1230 (8th Cir. 1978).[1]

JURISDICTION

The Judgment of the Court of Appeals, printed in Appendix "A" hereto, was entered on November 7, 1978.

The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTION PRESENTED

1. Does the state of South Dakota, which owns and operates a cement plant, and which has for many years sold substantial amounts of its product in interstate

1 This case was consolidated with two other cases on appeal to the U. S. Court of Appeals, Eighth Circuit. Only Reeves, Inc. petitions for a Writ of Certiorari. See footnote 1 of *Reeves v. Kelley, supra,* App. 3.

commerce violate the Commerce Clause of the United States Constitution by adopting a policy to prefer the sale of its cement to South Dakota consumers first before making sales available to non-residents of the State of South Dakota?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Constitutional provision involved is the Commerce Clause of Article I, Section 8, Clause 3 of the Constitution of the United States of America. The statute giving the District Court power to issue the injunction is 28 U. S. C., § 1651 (a). The rules giving the District Court discretion to hear the injunction is Rule 65 of the Federal Rules of Civil Procedure. These provisions are printed in Appendix "E" hereto. Article III, Section 10 of the South Dakota Constitution, *South Dakota Compiled Laws* 5-17-1, 5-17-2, 5-17-2.1 and 5-17-9 are printed in their entirety in Appendix "E" hereto. The Minutes of the South Dakota Cement Commission dated June 1, 1978, are printed in Appendix "C" hereto. The partial Minutes of the South Dakota Cement Commission dated June 26, 1974, are provided in Appendix "D" hereto.

BASIS OF JURISDICTION

Jurisdiction of the United States District Court for the District of South Dakota was conferred by 28 U. S. C., § 1331, and 28 U. S. C., § 1443.

STATEMENT

Petitioner is a corporation organized and existing under the laws of the State of Wyoming, with its principal place of business at Buffalo, Wyoming. Petitioner is engaged in the sale of concrete and concrete products and conducts its business in a three-county area located in Sheridan, Johnson and Campbell Counties, Wyoming. Petitioner supplies approximately 54% of the consumers who purchase concrete within its market area. Petitioner receives 100% of its cement, a necessary ingredient in the production of concrete, from outside the State of Wyoming.

Respondents are members of the South Dakota Cement Commission, appointed pursuant to *South Dakota Compiled Laws* 5-17-2 (See Appendix "E") to administer and control the South Dakota cement plant at Rapid City. Constitutional authorization for the operation of said plant is conferred by Article XIII, Section 10 of the Constitution of South Dakota (See Appendix "E"). The South Dakota Cement Commission and the state cement plant under its control are a principal department of state government. *South Dakota Compiled Laws* 5-17-2.1 (See Appendix "E").

For the last twenty (20) years, since its inception in 1958, petitioner has received 95% of its cement from the South Dakota Cement Commission in Rapid City, South Dakota. Since January 1, 1975, petitioner has purchased from the South Dakota cement plant the following dollar volumes:

1975	$ 871,000.00
1976	824,000.00
1977	1,172,000.00
1978 (to June 30, 1978)	235,000.00

The South Dakota Cement Commission has engaged in interstate commerce. Since the establishment of the state cement plant more than fifty years ago, cement has been manufactured and sold to both consumers residing in the State of South Dakota and consumers residing outside the state of South Dakota. The market area for the sale of cement by the South Dakota Cement Commission to its consumers included the following states in addition to the State of South Dakota: North Dakota, Minnesota, Nebraska, Iowa, Montana, Colorado and Wyoming.

On June 1, 1978, the respondents, acting under color of state law, took the following action:[2]

> "The Commission reaffirmed its policy of supplying all South Dakota customers first and to honor all contract commitments, with the remaining volume allocated on a first come first serve basis." Minutes of South Dakota Cement Plant, June 1, 1978, p. 3.

When the foregoing policy was instituted there was a serious cement shortage being experienced both nationally and in the South Dakota region. Shortages were caused by a dramatic increase of cement usage in the regular marketing area of the South Dakota cement plant. The sharp increase in use was also the cause of

---

2 Apparently the policy was first expressed at a meeting of the South Dakota Cement Commission at the state cement plant held on June 26, 1974 (see Appendix "D"). However, management did not enforce the policy until after it was "reaffirmed" on June 1, 1978.

shortages at neighboring cement manufacturers and in other regions of the United States.

On July 5, 1978, the petitioner dispatched a cement truck from Wyoming to the South Dakota cement plant in Rapid City, South Dakota, and requested that the truck be loaded with cement, at which time the driver of the petitioner's truck was informed that the truck could not be loaded for the reason that petitioner is located and does business outside the State of South Dakota. Petitioner was informed by officials of the respondents that it could not purchase cement at the South Dakota cement plant until all the demands for cement by residents of the state of South Dakota had been met. Because of a continuous cement shortage, the South Dakota Cement Commission refused to sell cement to petitioner.

On July 19, 1978, a civil suit was initiated by petitioner by filing a Complaint in the United States District Court for the District of South Dakota, Western Division. On the same date the petitioner filed a motion for a temporary restraining order and preliminary injunction. On July 21, 1978, the Honorable Andrew W. Bogue entered a restraining order prohibiting the respondents from refusing to serve the petitioner simply because the petitioner was not an entity within the boundaries of the state of South Dakota and declaring the policy adopted by the respondents in violation of the Commerce Clause and Privileges and Immunities Clause of the United States Constitution. On August 1, 1978, respondents filed their Notice of Appeal (from the restraining order entered July 21, 1978) to the United States Court of Appeals for the Eighth Circuit.

On appeal, the United States Court of Appeals, Eighth Circuit, remanded the cause to the District Court

with directions to vacate the injunction granted to the petitioner and to dismiss the Complaint for failure to state a claim for relief. Not applying the Privileges and Immunities Clause, the United States Court of Appeals, Eighth Circuit, concluded that the Commerce Clause does not limit South Dakota's power "to choose whether, to whom, and on what conditions to sell its goods." *Reeves, Inc. v. Kelley,* 586 F. 2d 1230, 1232 (8th Cir. 1978). Such activity was not considered by the Court as the type of activity that the Commerce Clause was enacted and intended to prevent.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it is not in accord with previous decisions of this Court in applying the Commerce Clause of the United States Constitution. If the decision below is not in conflict with the prior decisions of this Court then it is submitted that it presents far-reaching constitutional issues concerning the application of the Commerce Clause to state-owned and state-operated commercial facilities not previously addressed by this Court. In either event, this Court should grant review.

The action of the respondents, members of the South Dakota Cement Commission, an agency of the State of South Dakota, by instituting a policy to prefer all South Dakota customers over out of state customers in sales of state-owned and state-produced cement, directly discriminates against interstate commerce in violation of the

Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3. The minutes of the South Dakota cement plant, dated June 1, 1978, and attached hereto as Appendix "C", indicate a cement shortage was experienced not only in South Dakota but throughout the remainder of the country during the first half of 1978. The actions taken by the respondents, in preferring South Dakota citizens to all others, under the guise of state law, *South Dakota Compiled Laws*, 5-17-1, was an exercise in economic protectionism plainly prohibited by the decisions of this Court in its interpretation of the Commerce Clause of the United States Constitution.

The decision of the United States Court of Appeals for the Eighth Circuit below, holding that there was no Commerce Clause violation by respondents, is diametric to a long line of decisions of this Court extending from *Gibbons v. Ogden*, 9 Wheaton 1, 6 L. Ed. 23 (1824) to *City of Philadelphia v. New Jersey*, — U. S. —, 98 S. Ct. 2531, 47 L. Ed. 2d 475 (1978).

The guiding principle that ". . . the State may not promote its own economic advantages by curtailment or burdening of interstate commerce . . ." is one ". . . deeply rooted in both our history and our law." *H. P. Hood & Sons v. Du Mond*, 336 U. S. 525, 532-533, 69 S. Ct. 657, 662, 93 L. Ed. 865 (1949).

The Commerce Clause crystalized the necessity of centralized regulations among the states so ". . . every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any." See *H. P. Hood & Sons v. Du Mond*, *supra*, 336 U. S. at 539. This court needs to clearly enunciate this principle as it applies to state-owned and state-produced commodities marketed in interstate commerce by the state.

Not all state action is prohibited by the Commerce Clause. There are certain functions of the state, exercisable through its police power, which are permissible, when such burdens do not directly restrict the free flow of interstate commerce. See *Pike v. Bruce Church, Inc.*, 397 U. S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). The restrictions on sales of cement imposed by the respondents, however, had nothing to do with the health and safety of the citizens of South Dakota, and did nothing to shelter the citizens of South Dakota from fraud. The preference of sales to South Dakota residents was directed primarily to preserve the economic interests of South Dakota businesses which were experiencing a shortage of cement.

The action of the respondents was a direct interference with interstate commerce, and not one which interfered in an incidental fashion only. The language of the minutes of the June 1, 1978 meeting of the South Dakota Cement Commission is without ambiguity:

> ". . . the Commission re-affirmed its policy of supplying all South Dakota customers first and honor all contract commitments, with the remaining volume allocated on a first come, first served basis." At p. 3.

Officers and agents of the state had directed the plant to supply all South Dakota demands for cement first in preference to all interstate customers. As a direct interference with interstate commerce, it is submitted that the policy of the South Dakota Cement Commis-

sion is prohibited by the Commerce Clause regardless of its purpose. *Pike v. Bruce Church, Inc., supra.*

The Eighth Circuit decision in *Reeves, Inc. v. Kelley,* 586 F. 2d 1230, brushes aside a recent holding by this Court in the area of economic protectionism set forth in *City of Philadelphia v. New Jersey, supra:*

> "The opinions of the Court through the years have reflected an alertness to the evils of 'economic isolation' and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protection is effected by State legislation, a virtually *per se* rule of invalidity has been erected. (Citations omitted) The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a state's borders. (Citation omitted)" 98 S. Ct. at 2535.

The actions of the respondents are one of those "clear examples" referred to by the Court in which the State undeniably has stopped the flow of cement at the limits of its borders.

The Court below reasoned that *City of Philadelphia v. New Jersey, supra,* did not apply because of a footnote in that case which stated:

> "We express no opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state owned resources, . . ." 98 S. Ct. at 2537, n. 6.

But logically if the state's power is exercised consistent with the Commerce Clause, then no violation of the Commerce Clause would exist. *City of Philadelphia v. New Jersey, supra,* cannot be read to stand for the proposition that a state has the power to restrict its state-owned resources to its own citizens. If the state could restrict its resources because they were owned solely by the state, any state could isolate its economic interests, discriminate against competitors, and favor its citizens. Such actions are plainly prohibited by the Commerce Clause when done by state regulation of private industry. To allow a "state-owned" exception by the state would erode the integrity of the Commerce Clause.

This Court long ago recognized that a state could not hoard its natural resources for the sole use of its citizens where private industry has previously submitted the resources to the channels of interstate commerce. *West v. Kansas Natural Gas Co.,* 221 U. S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911); *Pennsylvania v. West Virginia,* 262 U. S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1922); *Foster-Fountain Packing Company v. Haydel,* 278 U. S. 1, 49 S. Ct. 1, 73 L. Ed. 147 (1928); *Johnson v. Haydel,* 278 U. S. 16, 49 S. Ct. 6, 73 L. Ed. 155 (1928); and *Toomer v. Witsell,* 334 U. S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948). The South Dakota cement plant has a long history of transactions with out-of-state consumers and of promoting the sale of its product not only intrastate but interstate. It is submitted that the actions of the respondents are identical to those taken by states which have sought to impose embargoes upon natural resources which were produced and marketed within the state by private industry with the exception that the "resources" in this case are state-owned commodities sold by the state. How can a state be prohibited from regulating private enterprise in the course of interstate commerce and yet be allowed to directly discriminate and burden interstate

commerce through its own products? Such economic isolationism should be determined by this Court as the type of activity which stands in adamant opposition to the Commerce Clause of the Constitution.

In reaching its decision below, the United States Court of Appeals, Eighth Circuit, applied the governmental-proprietary distinction to find the Commerce Clause not applicable. At page 1232 of 586 F. 2d it was stated:

> "It [South Dakota] has simply acted in a proprietary capacity as a seller of cement within the interstate cement market. Such activity is not the type of state action the Commerce Clause was intended to restrict."

Reliance upon this position is misplaced. The Commerce Clause is equally applicable whether a state has acted in a proprietary or governmental capacity. This court has consistently stated that the exercise of a power by a state, in whatever form or capacity, must be subordinate to the power to regulate interstate commerce which has been granted specifically and exclusively to the federal government. "[W]e think it unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity." *United States v. State of California,* 297 U. S. 175, 183, 56 S. Ct. 421, 424, 80 L. Ed. 567 (1936). A state cannot escape constitutional exercise of the granted federal power simply by defining its capacity as proprietary in nature. There is no such limitation upon the plenary power of the federal government to regulate commerce.

To apply concepts of title, ownership and the power to manage, to the state, in the words of Justice Holmes,

". . . is to lean upon a slender reed." *Missouri v. Holland,* 252 U. S. 416, 434, 40 S. Ct. 382, 384, 64 L. Ed. 641 (1920). In *Douglas v. Seacoast Products, Inc.,* 431 U. S. 265, 97 S. Ct. 1740, 52 L. Ed. 2d 304 (1977), this Court stated:

> "The 'ownership' language of cases such as those cited by appellant must be understood as no more than a 19th century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.' *Toomer v. Witsell,* 334 U. S. 385, 402, 68 S. Ct. 1156, 1165, 92 L. Ed. 1460 (1948); See also *Takahashi v. Fish and Game Commission,* 334 U. S. 410, 420-421, 68 S. Ct. 1138, 1143, 92 L. Ed. 1478 (1948)" 97 S. Ct. at 1751-1752.

The decision of the United States Court of Appeals, Eighth Circuit, placed heavy reliance on *Hughes v. Alexandria Scrap Corporation,* 426 U. S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976). The fact situation of the *Hughes* case is clearly distinguishable from the present case. The present case does not deal with a state subsidy program. Neither the state of South Dakota nor the South Dakota Cement Commission were in the market as a purchaser only. There was an express trade barrier imposed by the resolution adopted by respondents. Whether a state imposes burdens upon interstate commerce by placing restrictions on private individuals and businesses or places restrictions on its own governmental agencies, the effect is the same. The state cannot escape the power of the Commerce Clause by changing the form in which it imposes direct burdens upon interstate commerce. See *Baldwin v. G. A. F. Seelig, Inc.,* 294 U. S. 527, 55 S. Ct. 497, 79 L. Ed. 1032 (1935).

The United States Court of Appeals, Eighth Circuit, also erred in assuming that private industry in a similar situation could refuse to sell to non-residents if it so chose. This right is not absolute. Private industry engaged in selling commodities in interstate commerce may select its own customers in a bona fide transaction only so long as it does not restrain trade, i. e., eliminate competitors. See Section 1 of the Sherman Anti-Trust Act, 15 U. S. C. § 1 (originally enacted as Act of July 2, 1890, c. 647, 26 Stat. 209). What the respondents have done is eliminate competition for the purchase of South Dakota cement from consumers in Wyoming, North Dakota, Minnesota, Nebraska, Iowa, Montana and Colorado. Such state action is much different than that of a state entering the market as a purchaser as in *Hughes v. Alexandria Scrap Corporation, supra,* and favoring its residents.

Even if the United States Court of Appeals, Eighth Circuit, believed that Congress may not have acted to regulate private industry in situations similar to those involved here, the fact that Congress does not exercise its power does not limit the federal power granted under the Commerce Clause to regulate commerce among the states. See *Willson v. The Blackbird Creek Marsh Co.,* 2 Pet. 245, 252, 7 L. Ed. 412 (1829), *City of Philadelphia v. New Jersey, supra,* and *Raymond Motors Transp., Inc. v. Rice,* 434 U. S. 429, 98 S. Ct. 787, 54 L. Ed. 2d 664 (1978).

The Commerce Clause is not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but its own force creates an area of trade free from interference by the states. The Commerce Clause, even without implementing legislation by Congress, is a limitation upon the

power of the states. *Great Atlantic & Pac. Tea Co., Inc. v. Cottrell,* 424 U. S. 366, 96 S. Ct. 923, 47 L. Ed. 55 (1976).

Even if the restrictions imposed by the respondents were found to be an indirect or incidental burden on interstate commerce and thus subject to the rule enunciated in *Pike v. Bruce Church, Inc., supra,* there is no valid justification for the imposition of the burden which would be overcome by its benefit to local interest. It has traditionally been recognized that such burdens upon interstate commerce, when such burdens are incidental, are legitimate only when the state seeks to protect its citizens by insuring their health or safety and by shielding them from fraud. *H. P. Hood & Sons v. Du Mond, supra. Pike v. Bruce Church, Inc., supra,* pointed out that the motives of the state must be directed towards the safety of its citizens. 397 U. S. at 142 This limitation was again reiterated in the recent case of *Raymond Motors Transp., Inc. v. Rice, supra.*

In any event, when it is shown that a hindrance has been placed upon interstate commerce, the burden lies with the state to show that the benefits which result to local interests overcome the impositions placed upon interstate commerce and that there are no alternative nondiscriminatory measures that can be taken. *Hunt v. Washington State Apple Advertising Com'n,* 432 U. S. 333, 97 S. Ct. 2434, 2446, 53 L. Ed. 2d 383 (1977).

If the decision below is allowed to stand it would be permissible for any state to set up a commission for the production and marketing of any natural resource or

commodity owned and produced by the state, and impose restrictions or preferences to meet local demands first. The dangers of such authority are vast. A state with great reserves in natural gas or petroleum could create a state commission for acquiring, exploring, drilling, refining and marketing of the same. It could then impose discriminatory requirements upon that commission to prevent or limit their sale to out-of-state consumers. By doing such they would be circumventing the commerce clause restrictions enunciated in *West v. Kansas Natural Gas Company, supra,* and *Pennsylvania v. West Virginia, supra.* Wyoming and Montana with their vast coal reserves could create state commissions with authority to acquire, prospect for, mine, and prepare coal for marketing. Each state could then impose restrictions upon the commission preventing the commission from selling coal to out-of-state consumers until all in-state purchasing demands were met. States which possess timber as a chief resource could limit or stop the interstate sale of lumber by creating state commissions with authority to log the same. The holding of the Court below permits the State of South Dakota to elude the purpose of the Commerce Clause by deciding an important constitutional question not directly addressed in previous decisions of this Court. The results could be disastrous. The federal free trade unit protected by our constitution would become subordinate to the entry of states in commercial enterprises.

This Court should now deal with the important constitutional question of whether respondents may restrict interstate commerce by discriminating against sales of state-owned cement to non-residents of South Dakota and preferring sales and deliveries to those who live within the borders of South Dakota.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DENNIS M. KIRVEN of
KIRVEN AND KIRVEN

104 Fort Street
Buffalo, Wyoming 82834

Counsel for Petitioner

APPENDIX "A"

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

Nos. 78-1578, 78-1720 and 78-1721

No. 78-1578

Reeves, Inc.,

Appellee,

vs.

Tom Kelley, Stan Frank, John E. Phelps, Al Sandvig and Dave Johnson, Members of the South Dakota Cement Commission,

Appellants.

Appeal from the United States District Court for the District of South Dakota.

No. 78-1720

Mullinax Concrete Service Company, a Corporation,

Appellee,

vs.

Tom Kelley, Stan Frank, John E. Phelps, Al Sandvig and Dave Johnson, Members of the South Dakota Cement Commission,

Appellants.

Appeal from the United States District Court for the District of South Dakota.

No. 78-1721

Russell's Ready Mix, Inc., a Corporation,

Appellee,

vs.

Tom Kelley, Stan Frank, John E. Phelps, Al Sandvig and Dave Johnson, Members of the South Dakota Cement Commission,

Appellants.

Appeal from the United States District Court for the District of South Dakota.

Submitted: October 19, 1978

Filed: November 7, 1978

Before LAY, ROSS and McMILLIAN, Circuit Judges.

LAY, Circuit Judge.

In 1919 the State of South Dakota, as authorized by its constitution, created a cement commission by legislative charter to carry out the manufacture, distribution and sale of cement as "works of public necessity and importance." S. D. Const. art. XIII, § 10; S. D. Compiled Laws Ann. § 5-17-1,-2,-9. *See generally Eakin v. South Dakota State Cement Comm'n,* 44 S. D. 268, 183 N. W. 651 (1921). In the past the Commission has operated a cement plant and has sold its products to out of state customers as well as to South Dakota residents. In recent months the demand for cement has risen sharply. Therefore, on June 1, 1978, the Commission reaffirmed a policy of supplying all South Dakota customers first and honoring all contract commitments, with the remaining volume being allocated on a first come, first served basis. As a result of this policy and the continuing cement shortage, the Commission refused to sell to out of state customers. Reeves, Inc., a Wyoming corporation, challenged this policy in federal district court. The district court, the Honorable Andrew Bogue presiding, found that such policy violated the Commerce Clause of the United States Constitution, U. S. Const. art. I, § 8, cl. 3, and enjoined its application to Reeves, Inc. Subsequently, Mullinax Concrete Service Co., a Wyoming corporation, and Russell's Ready Mix, Inc., an Iowa corporation, brought suit seeking a permanent injunction of the policy.[1] The court granted the requested relief in each case and permanently enjoined the Commission from taking any action to prohibit the sale of cement to prospective out of state purchasers because of their nonresidency. The State Cement Commission has filed this appeal. We reverse and remand to the district court with directions to vacate the injunctions.

The federal district court in issuing injunctive relief held:

> The South Dakota Cement Commission's policy of refusing to serve the Plaintiff simply because the corporation is not an entity within the boundaries of the State of South Dakota is declared to be a violation of the Commerce Clause and the Privilege [sic] and Immunities Clause of the United States Constitution.

Reeves, Inc. v. Kelley, No. 78-5060, slip op. at 3 (D. S. D. July 21, 1978).

---

1 These suits were necessary since following the court's action in *Reeves, Inc. v. Kelley,* No. 78-5060 (D. S. D. July 21, 1978), the Commission adopted a "prioritization" policy, whereby all customers, resident or nonresident, were allowed to purchase an amount equal to 50 per cent of the average amount they had purchased over the last three years. Implementation of that policy or of any other policy requiring out of state sales before the needs of South Dakota customers were met, except as to Reeves, Inc., however, was enjoined by a South Dakota circuit court as violative of the South Dakota Constitution and laws. The Commission obeyed, thus giving rise to *Russell's Ready Mix, Inc. v. Kelley,* No. 78-5073 (D. S. D. Sept. 22, 1978), and *Mullinax Concrete Service Co. v. Kelley,* No. 78-5074 (D. S. D. Sept. 22, 1978). Those cases were consolidated with *Reeves, Inc.* for argument and decision on appeal.

Judge Bogue concluded:

> A state may not compel the confinement of their resources to their own people, whenever such hoarding and confinement impedes interstate commerce.
>
> This Court is aware of the fact that the South Dakota Cement Plant is publicly owned by the citizens of this state, for public use. It should be noted, however, that the Commission had made an election to become part of the interstate commerce system. Such an election was made when the Commission began selling to out-of-state entities, in competition with private industry. As a result of that election, the South Dakota Cement Plant is required to comply with the mandates of the United States Constitution, including the Commerce Clause and the Privilege [sic] and Immunities Clause.

Id. at 1-2.

The commerce clause[2] has been interpreted as primarily intended to inhibit the power of the states to interfere with the natural functioning of the interstate market through burdensome regulation or prohibition. *See City of Philadelphia v. New Jersey*, 98 S. Ct. 2531, 2535-37 (1978);[3] *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794,

---

2. We discuss application of the commerce clause only. The plaintiffs are all corporations, and corporations are not citizens within the meaning of the privileges and immunities clause, U. S. Const. art. IV, § 2, cl. 1. *Asbury Hosp. v. Cass County*, 326 U. S. 207, 210-11 (1945); *Paul v. Virginia*, 75 U. S. (8 Wall.) 168, 177 (1868).

3 In *City of Philadelphia v. New Jersey*, a decision relied upon by the plaintiffs, the Court struck down a New Jersey statute which prohibited importation of solid or liquid waste collected outside of New Jersey. The case stands for the principle that a state may not prevent shipment of privately

(Continued on next page)

806 (1976). In the instant case South Dakota has not attempted to pass any regulation or prohibition on any private industry functioning in commerce. It has simply acted in a proprietary capacity as a seller of cement within the interstate cement market. Such activity is not the type of state action the commerce clause was intended to restrict.

In *Hughes v. Alexandria Scrap Corp.*, the State of Maryland in an attempt to rid the landscape of junk cars paid a "bounty" to scrap processors for the destruction of inoperable automobiles over eight years old. An out of state processor was required to show title documentation in order to receive the bounty, whereas an in state processor was not. The result was a reduction in the bounties secured by out of state processors from the State of Maryland. A three judge district court concluded that the act constituted an impermissible burden on interstate commerce. The Supreme Court reversed, holding that the State of Maryland did not prohibit or regulate commerce but merely entered the market as a purchaser. In so holding the court said:

> Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and

---

(Continued from previous page)

owned articles of trade in interstate commerce on the ground of local need or command. *See also Pennsylvania v. West Virginia*, 262 U. S. 553 (1923); *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229 (1911). The Court specifically observed in *City of Philadelphia*, however:

> We express no opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state owned resources. . . .

98 S. Ct. at 2537 n. 6.

> exercising the right to favor its own citizens over others.

426 U. S. at 810.[4]

The State of South Dakota, in carrying out this proprietary activity possesses the rights of and is subject to the regulatory restrictions on any private business making marketing decisions. *See National League of Cities v. Usery,* 426 U. S. 833, 854 n. 18 (1976); *United States v. California,* 297 U. S. 175 (1936). If a private industry had chosen to market the cement, it would be difficult to argue that the United States Constitution would compel it to sell to nonresidents if it did not so choose. We fail to see that the State of South Dakota must be treated any differently, simply because it is a public body rather than a private industry. The mere fact that it at one time sold cement to out of state entities does not place greater restrictions on its business dealings. South Dakota could have chosen never to make its cement available to out of state customers, and the constitutional question, had it arisen, would not be analytically different from that presented by its recent decision to prefer its residents. *Hughes v. Alexandria Scrap Corp., supra,* 426 U. S. at 809, 817 (Stevens, J., concurring). Nothing in this range of possible marketing decisions affects the initial question whether the commerce clause limits South Dakota's power to choose whether, to whom, and on what

---

4 The fact that Maryland was a purchaser and South Dakota a seller is not a significant difference between *Hughes* and this case, since regulation of interstate products going either into or out of a state may offend the commerce clause. *Hughes* v. *Alexandria Scrap Corp., supra,* 426 U. S. at 808 n. 17.

conditions to sell its goods. We hold that the commerce clause does not.

While a state is similar to private business when it participates in the market in a purely proprietary capacity, it is also somewhat different. As a government providing a public service and utilizing the money and resources of its residents, it has a right and perhaps even an obligation to consider their common good and conserve their resources so long as it does not do so by attempting to regulate or control commerce among the states. *Toomer v. Witsell,* 334 U. S. 385, 409 (1948) (Frankfurter, J., concurring). The factual background in these cases does not indicate that South Dakota has attempted to control channels of interstate commerce. Accordingly, we hold the commerce clause does not prohibit the State of South Dakota "from participating in the market and exercising the right to favor its own citizens over others." *Hughes v. Alexandria Scrap Corp., supra,* 426 U. S. at 810. *Cf. American Yearbook Co. v. Askew,* 339 F. Supp. 719 (M. D. Fla.), *aff'd mem.,* 409 U. S. 904 (1972) (upholding the validity of state printing statutes which required all public printing of the state to be done in the state).

The causes are remanded with directions to the district court to vacate the injunctive relief issued and to dismiss the respective complaints in each case for failure to state a claim for relief.

It is so ordered.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX "B"

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CIV78-5060

REEVES, INC.,

Plaintiff,

vs.

TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG and DAVE JOHNSON, members of the South Dakota Cement Commission,

Defendants.

RESTRAINING ORDER

(Filed July 21, 1978)

Plaintiff made application to this Court for a Temporary Restraining Order, Preliminary Injunction, and a Permanent Injunction, directing the State Cement Plant to abandon its present policy of selling cement only to residents of the State of South Dakota. The Court having heard the arguments presented by counsel at a hearing held July 19, 1978, and after reviewing the memorandums and cases submitted, as well as the law with respect to injunctive relief; the Court finds:

(1) There is a threat of irreparable harm to the Plaintiff if an injunction is not granted;

(2) The balance of said harm to the Plaintiff outweighs any harm to the Defendants; and

(3) The public interest of the entire region (South Dakota, Nebraska, Wyoming, North Dakota, Minnesota, Iowa) will be best served by issuance of this Restraining Order.

Both the Commerce Clause and the Privilege and Immunities Clause of the United States Constitution were intended to protect commercial and personal intercourse from invidious restraints, to prevent interference through conflicting hostile state laws or policies. In the matter of interstate commerce we are a single nation—one and the same people. All the states are bound by these clauses and protected by them. A state may not compel the confinement of their resources to their own people, whenever such hoarding and confinement impedes interstate commerce.

This Court is aware of the fact that the South Dakota Cement Plant is publicly owned by the citizens of this state, for public use. It should be noted, however, that the Commission had made an election to become part of the interstate commerce system. Such an election was made when the Commission began selling to out-of-state entities, in competition with private industry. As a result of that election, the South Dakota Cement Plant is required to comply with the mandates of the United States Constitution, including the Commerce Clause and the Privilege and Immunities Clause.

The Court is aware of the interest and desires of the Defendants to satisfy both the residents of South Dakota and the out-of-state residents. It realizes that the Defendants are cognizant of the fact that non-residents have, in the past, been loyal users of South Dakota cement, to the financial benefit of South Dakota. The South Dakota Cement Plant, however, cannot refuse to sell cement to Reeves Construction Company simply because it is not an entity within the boundaries of South Dakota. If a state, in this union, were allowed to hoard its commodities

or resources for the use of their own residents only, a drastic situation might evolve. For example, Pennsylvania or Wyoming might keep their coal, the northwest its timber, and the mining states their minerals. The result being that embargo may be retaliated by embargo and commerce would be halted at state lines.

Because of the fact that the Defendants in this case were given considerable notice of the hearing on the legal issues contained herein and did appear in opposition to the Plaintiff's applications for Temporary Restraining Order, Preliminary and Permanent Injunctions, and because of the further fact that both sides have thoroughly briefed and argued the legal issues involved herein on the merits, and there being no substantial issue of a material fact, it is the ORDER of this Court that under 65a (2) of the Federal Rules of Civil Procedure, the hearing referred to will be a consolidated final hearing with preliminary injunction hearing, upon all legal issues contained in this case. This injunction will be considered as dispositive of all legal issues raised in this case.

The South Dakota Cement Commission's policy of refusing to serve the Plaintiff simply because the corporation is not an entity within the boundaries of the State of South Dakota is declared to be a violation of the Commerce Clause and the Privilege and Immunities Clause of the United States Constitution. It is therefore

ORDERED that the South Dakota Cement Commission is restrained from using such policy as related to the Plaintiff herein.

Dated this 21st day of July, 1978.

By the Court:

Andrew W. Bogue
United States District Judge

Attest:
William J. Srstka, Clerk

By Betty B. Berry, Deputy

APPENDIX "C"

MINUTES

SOUTH DAKOTA CEMENT PLANT

JUNE 1, 1978

A regular meeting of the members of the South Dakota Cement Commission was held at Pierre, South Dakota, June 1, 1978 with the following Commission members being present: Tom Kelley, Chairman; Stan Frank, Vice Chairman; John E. Phelps, Secretary-treasurer, Al Sandvig and Dave Johnson.

Also present were William P. Scanlon, President and General Manager; Joseph J. Ziegler, Vice President of Administration, and Mr. Fred Winkler for Plant Counsel, Donald R. Schultz.

The minutes of the regular meeting of May 18, 1978 were read and approved as written. The Commissioners' per diem allowance for the month of May were reviewed for payment.

The disbursement record and the status of funds invested by the State Investment Officer for the month of May were reviewed and upon motion duly made, seconded and unanimously carried, the Commission approved the same as presented.

The amount of funds necessary to transact business at the Plant for the next thirty-one day (31) period was reviewed and upon motion duly made, seconded and unanimousely carried, the following resolution was adopted:

RESOLUTION OF THE SOUTH DAKOTA CEMENT COMMISSION

Pursuant to the provisions of Chapter 5-17 of SDCL (1967) IT IS HEREBY RESOLVED: By the South Dakota Cement Commission that its Secretary-treasurer be, and he is authorized and instructed to make a requisition and file the same with the State Auditor for a sum not to exceed Two Million and no/100 Dollars ($2,000,000.00) which is the estimated amount necessary for the transaction of business for the thirty-one day period beginning July 1, 1978.

/s/ Tom Kelley
Chairman

/s/ John E. Phelps
Secretary-treasurer

Commission Meeting
June 1, 1978
Page 2 of 3

Upon motion duly made, seconded and unanimously carried, the following resolution was adopted:

RESOLUTION OF THE SOUTH DAKOTA CEMENT COMMISSION

WHEREAS, The provisions of South Dakota Compiled Laws (SDCL) 5-17-2 requires the Commission to annually choose from its membership a chairman, vice-chairman and secretary-treasurer; therefore

BE IT RESOLVED That the South Dakota Cement Commission has unanimously nominated and elected Mr. Tom Kelley as chairman, Mr. Stan Frank as vice-chairman and Mr. John E. Phelps as secretary-treasurer; and

BE IT FURTHER RESOLVED That said appointments be effective for the ensuing fiscal year commencing July 1, 1978.

/s/ Tom Kelley
Chairman

/s/ John E. Phelps
Secretary-treasurer

Commission Meeting
June 1, 1978
Page 3 of 3

Attorney Fred Winkler reviewed with the Commission the notice of hearing to pass, amend and repeal the Plant's retirement rules pursuant to the provisions of SDCL 1-21 and SDCL 5-17-5. Because of the statutory timetables to be adhered to and the requirements of the fiscal note, the Commission authorized management to publish the notice of hearing as soon as practical in accordance with the statutory provisions.

President Scanlon reported to the Commission on the matter of the serious cement shortage being experienced at the plant and throughout the country. This shortage is due to a dramatic increase in cement usage in the regular marketing area, the shortage of supply by all neighboring cement manufacturers and nationally, and the plant's inability to place number six kiln on line as originally planned. Mr. Scanlon also stated that various attempts have been made to procure cement from other cement plants without success. The Commission discussed the Plant's major contract commitments requiring approximately 218,000 tons of cement for 1978 for paving projects only. After discussing all these matters at considerable length, the Commission reaffirmed its policy of supplying all South Dakota customers first and to honor all contract commitments, with the remaining volume allocated on a first come, first served basis. The Commission also instructed management to continue its efforts in procuring additional cement to aid in meeting current demands. Because of the serious cement shortage, President Scanlon was requested to stay in close communica-

tion with the Commission on all matters of significant nature.

Chairman Kelley reported to the Commission that the Chicago North Western Railroad line between Rapid City and Pierre is currently slated for extensive repair and replacement.

President Scanlon reported to the Commission on the following items: Plant equipment acquisitions and the status of Plant fuel and power contracts.

The Commission then discussed the annual plant picnic and tentatively set the date for July 16, 1978 with an alternative date of July 23 in the event of inclement weather.

There being no further business to conduct, upon motion duly made, seconded and unanimously carried, the meeting was adjourned until the next regular meeting tentatively scheduled to be held in Rapid City, South Dakota on July 11, 1978.

/s/ Tom Kelley
Chairman

/s/ John E. Phelps
Secretary-treasurer

APPENDIX "D"

Commission Meeting, June 26, 1974 Page 5

The Commission expressed its desire that South Dakota customers and South Dakota contracts be given preference in compliance with the constitution and statutes of this State and that the customers of the Plant be assured that the Plant will make all efforts to fulfill its commitments. President Scanlon announced that the Plant was operating at 98.4% of capacity.

On motion duly made and seconded and carried unanimously, the following resolution was adopted:

RESOLUTION OF THE SOUTH DAKOTA CEMENT COMMISSION

There being no further business to come before the meeting, upon motion duly made, the meeting was adjourned with the Commission's expression to the Honorable Richard F. Kneip, Governor of the State of South Dakota for his attendance and advice.

/s/ Tom Kelley, Chairman /s/ Donald R. Shultz, Secretary-Treasurer

---

APPENDIX "E"

RELEVANT CONSTITUTIONAL PROVISIONS STATUTES, RULES AND REGULATIONS

The Constitution of the United States of America, Article I, Section 8, Clause 3 provides:

> "Section 8. The Congress shall have the Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

28 U. S. C., § 1254 (1), provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

28 U. S. C., § 1331, provides:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.
>
> (b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entilted to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff, and, in addition, may impose costs on the plaintiff."

28 U. S. C., § 1443, states:

"Any of the following civil actions or criminal prosecutions, comenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

28 U. S. C., § 1651 (a), states:

"(a) The Supreme Sourt and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the useages and principles of law."

Federal Rules of Civil Procedure, Rule 65, states:

" *Rule 65. Injunctions.*

(a) PRELIMINARY INJUNCTION.

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be inadmissible upon the trial on the merits becomes a part of the record on the trial and need not be repeated upon the trial. This subdivision (a)

(2) shall be so construed and applied to save the parties any rights they may have to trial by jury.

(b) TEMPORARY RESTRAINING ORDER; NOTICE; HEARING; DURATION. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary rest aining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the ad-

verse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) SECURITY. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) EMPLOYER AND EMPLOYEE; INTERPLEADER; CONSTITUTIONAL CASES. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, USC, § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, USC, § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges."

The South Dakota Constitution, Article XIII, Section 10, states:

> "The manufacture, distribution and sale of cement and cement products are hereby declared to be works of public necessity and importance in which the state may engage, and suitable laws may be enacted by the Legislature to empower the state to acquire, by purchase or appropriation, all lands, easements, rights of way, tracts, structures, equipment, cars, motive power, implements, facilities, instrumentalities and material, incident or necessary to carry the provisions of this section into effect: provided, however, that no expenditure of money for the purposes enumerated in this section shall be made, except upon a vote of two-thirds of the members elected of each branch of the Legislature."

South Dakota Compiled Laws 5-17-1 states:

> "The people having adopted amendments to our state Constitution to the effect that the manufacture, distribution, and sale of cement and cement products are works of public necessity and importance in which the state may engage, it is hereby declared that the manufacture, distribution, and sale of cement and cement products are public purposes impressed with a public use and as such governmental functions subject to regulation by the state."

South Dakota Compiled Laws 5-17-2 states:

> "There is hereby created a state cement commission. The commission shall consist of five (5) members to be appointed by the Governor for terms of five (5) years. No more than four (4) members may be members of the same political party. Any member appointed to fill a vacancy arising from other than the natural expiration of the term shall serve only for the unexpired term. The commission shall annually choose from its membership a chairman, vice-

chairman, and secretary-treasurer. No member may be removed from office except for cause."

South Dakota Compiled Laws 5-17-2.1 states:

"The state cement commission and the state cement plant under its control shall comprise a principal department of state government."

South Dakota Compiled Laws 5-17-9 states:

"The state cement commission is hereby empowered and authorized to operate the South Dakota state cement plant located at Rapid City, South Dakota, to sell the products produced at said plant, to fix the price of such products and to determine the manner and methods of the terms under which such products shall be sold, to advertise such products to the public in such manner as the commission shall deem proper, and to do all things in the operation of such plant and the sale of its product as the commission may deem necessary or expedient to the successful operation of said plant."

Supreme Court, U. S.
FILED
MAR 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1194

REEVES, INC.,

Petitioner,

vs.

TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG and DAVE JOHNSON, members of the South Dakota Cement Commission,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Donald R. Shultz
Lynn, Jackson, Shultz & Lebrun, P.C.
P.O. Box 8110
Rapid City, SD 57701
Counsel for Respondents

1979—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. ———

REEVES, INC.,

Petitioner,

vs.

TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG and DAVE JOHNSON, members of the South Dakota Cement Commission,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner contends that the Respondents, (hereinafter referred to as "South Dakota"), violated the Commerce Clause when they restricted sales of State owned manufactured cement to residents of the State of South Dakota.

The Court of Appeals reversed the District Court, (Pet. Appendix "A"), holding that the Commerce Clause of the United States Constitution does not limit the State of South Dakota's power to choose whether, to whom, and on what condition it sells its owned manufactured goods as opposed to those goods placed in the stream of commerce by private citizens.

STATEMENT

In 1919, the State of South Dakota, as authorized by its constitution, created a Cement Commission by legislative charter to carry out the manufacture, distribution and sale of cement as "works of public necessity and importance in which the State may engage". S.D. Constitution, Art. XIII, §10; S.D.C.L. Anno. § 5-17-1, -2, -9. (Pet. App. C. p. 21, 22).

In 1978, a serious shortage of manufactured cement arose in South Dakota, and on June 1, 1978, the Commission reaffirmed a policy (Pet. App. C, p. 14) of supplying all South Dakota customers first and honoring all contract commitments, with the remaining volume to be allocated on a first come, first served basis. As a result of the shortage, no cement was sold to out-of-state customers.

The District Court had held that this policy violated the Commerce Clause and the Privileges and Immunities Clause of the U.S. Constitution, Art. I, §8, cl. 3 and Art. IV, §2, cl.1.

The Court of Appeals reversed the District Court and vacated the injunctions, holding that the Commerce Clause does not prohibit South Dakota from participating in the market and exercising the right to favor its own citizens over others. *Reeves, et al. v. Kelley, et al.*, 586 F.2d 1230, 1233 (1978).

REASONS FOR REFUSING THE WRIT

1. *COMMERCE CLAUSE.* Petitioner argues that the decision of the Court of Appeals should be reviewed because it is not in accord with previous decisions of this Court in the application of the Commerce Clause. Petitioner blindly overlooks the decision of this Court relied upon by the Court of Appeals. Petitioner is in error in relying upon the rationale of decisions from *"Gibbons v. Ogden*, 9 Wheaton 1, 6 L.Ed.23 (1824), to *City of Philadelphia v. New Jersey*, — U.S. —, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978)." (Pet. p.8).

Petitioners reliance on the constitutional principles controlling these cases proceeds from a fundamental misconception of the difference between a state using its legislative powers to restrict or burden commerce between citizens in interstate commerce and a state selling its owned manufactured product. The Court of Appeals correctly distinguished petitioner's cases. The factual background in every one of the cases relied upon by petitioner was an attempt by the State to regulate the channels of interstate commerce to prevent or burden a private citizen's access to the channels of commerce.

The Commerce Clause is a delegation to Congress of the power "to regulate commerce among the several States".

The delegation of the power to Congress forbids the States from exercising its governing powers to restrict or burden interstate commerce. The purpose of the constitutional restriction is to enable citizens to market their goods freely taking advantage of the free enterprise system and to avoid unnecessary burdens on commerce. *Hughes v. Alexandria Scrap Corporation*, 426 U.S. 794, 49 L.Ed.2d 220, 96 S.Ct. 2488 (1976).

All the cases relied upon by the petitioner[1] address

[1] *Gibbons v. Ogden, supra,* involved regulation by New York State limiting navigation of navigable waters to one individual.

City of Philadelphia v. New Jersey, supra, this court struck down a New Jersey statute preventing privately owned articles of trade (sludge) from being shipped to and buried in privately owned New Jersey land. The court was careful to point out in a footnote:

the specific prohibition that the state shall not restrict a private citizen in the marketing of his property. No case relied upon by the petitioner, holds that the State is regulating commerce when it sells its owned manufactured product.

2. *STATE OWNERSHIP.* This Court of Appeals properly decided this case in accord with previous decisions

---

"We express no opinion about New Jersey's power consistent with the Commerce Clause, to restrict to state residents access to state owned resources." (footnote 6, 57 L.Ed.2d 484)

H. P. Hood & Sons v. Du Mond, 336 U.S. 525, 532-533, 69 S.Ct. 657, 662, 93 L.Ed. 865 (1949) and *Baldwin v. Seelig, Inc.*, 294 U.S. 527, 55 S. Ct. 497, 79 L.Ed. 1032 (1935), involved the State's exercise of its governmental regulatory function in an attempt to regulate the sale of imported milk by fixing minimum prices to be paid by in-state dealers to producers of milk and prohibiting sales of milk brought into the state from out-of-state private citizens unless minimum prices were paid to private producers. Any state regulation of milk distribution conflicted with the Federal Milk Marketing Act.

Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S. Ct. 844, 25 L.Ed. 2d 174 (1970) involved state regulations requiring fruit producers to go into a local packing business solely for the sake of enhancing the reputation of other producers within its borders.

West v. Kansas Natural Gas Co., 221 U.S. 229, 31 S. Ct. 564, 55 L.Ed. 716 (1911) and *Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S. Ct. 658, 67 L.Ed. 1117 (1922) both involved statutes aimed at the regulation of privately owned products and their movement in interstate commerce.

Foster-Fountain Packing Company v. Haydel, 278 U.S. 1, 49 S. Ct. 1, 73 L.Ed. 147 (1928) and *Johnson v. Haydel*, 278 U.S. 16, 49 S. Ct. 6, 73 L.Ed. 155 (1928) dealt with the State attempting to regulate commerce in privately owned products. Louisiana had passed a statute declaring all shrimp to be property of the State and required the shrimp to be packed and canned within the State before being shipped out of state. The Supreme Court found the Commerce Clause to be violated because the shrimp had become privately owned articles when reduced to possession by private industry; but, only because the purpose of the statute was to promote in-state processing as opposed to in-state consumption. However, the court noted that had the State chosen to retain ownership over all shrimp in its territorial waters, it could have restricted the shrimp for the consumption and use of its citizens only (278 U.S. 1, 13).

Douglas v. Seacoast Products, Inc., 431 U.S. 265, 97 S. Ct. 1740, 52 L.Ed.2d 304 (1977) this court held that Federal statute on licensing fishing vessels preempted Virginia statutes which in effect prohibited nonresidents of Virginia from fishing in Chesapeake Bay. Petitioners' reliance is again misplaced because the case turned on the Supremacy Clause and not on the Commerce Clause.

of this Court. The State of South Dakota, in making a marketing decision in the sale of its cement, is not limited by the Commerce Clause in its power to choose whether, to whom, and on what conditions it markets its goods.

> "As a government providing a public service and utilizing the money and resources of its residents, it has the right and perhaps even an obligation to consider their common good and conserve their resources so long as it does not do so by attempting to regulate or control commerce among the states." 586 F.2d at 1233.

The Court of Appeals correctly relied on *Toomer v. Witsell*, 334 U.S. 385, 409, 68 S. Ct. 1156, 92 L.Ed. 1460 (1948); *Hughes v. Alexandria Scrap Corp., supra*, and *American Yearbook Co. v. Askew*, 339 F.Supp. 719 (M. D. Fla.), aff'd mem., 409 U.S. 904, 93 S. Ct. 230, 34 L.Ed.2d 168 (1972).

The *American Yearbook* case involved a Florida statute which required all public printing to be done in the State. The case held that the Commerce Clause. in striking down State statutes regulating private industry, is not applicable to State statutes specifying conditions of State purchases. The rationale of the *American Yearbook* concerning State purchases logically would apply to State sales.

Petitioner attempts to criticize the Court of Appeals' reliance upon *Hughes v. Alexandria Scrap Corporation, supra*, by distinguishing a State subsidy program from State sales. This distinction is without merit. The subsidy program dealt with subsidies to privately owned car bodies within the State, and properly withstood the constitution-

al muster of the Commerce Clause. Surely if a subsidy to privately owned products is constitutional, a fortiori, the state, in the sale of its property, can prefer its citizens.

3. *WILD GAME DOCTRINE.* Petitioner erroneously relies upon criticizing the "wild game" ownership theory to erode the logic of the Court of Appeals. (Pet. p. 13). Justice Holmes, in his statement that State claimed ownership of migratory birds, "is to lean on a slender reed", in *Missouri v. Holland*, 252 U.S. 416, 434, 40 S. Ct. 382, 64 L.Ed. 641 (1920), was questioning the title that a state could legitimately claim to migratory birds. Certainly this analogy can be of little comfort to petitioner as it can hardly question the title of South Dakota to its owned manufactured cement. This court, however, in the recent case of *Baldwin v. Fish and Game Commission of Montana*, — U.S. —, 56 L.Ed.2d 354 at 367, 98 S. Ct. 1852 (1978), refused to recognize the demise claimed for the rationale of the wild game doctrine and legislation. In any event the Court of Appeals did not rely upon the wild game cases for its opinion.

4. *ANTI-TRUST ARGUMENT.* Petitioner is in plain error in assuming that South Dakota violated the Sherman Anti-Trust Act in determining to whom and on what terms it chooses to sell its product. This was not an issue presented by petitioner to either the District Court or the Court of Appeals. 42 L.Ed.2d 946. The argument is specious in view of the recent affirmation of the *Parker v. Brown* doctrine in *New Motor Vehicle Board of the State of California, et al. v. Orrin W. Fox Co.*, — U.S. —, 58 L.Ed.2d 361, 99 S. Ct. 403 (1978).

5. *BURDEN OF PROOF.* Petitioner's final argument would place the burden of proof on a state to show that benefits resulting to local interests overcome impositions placed on interstate commerce, relying upon *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 97 S.Ct. 2434, 2446, 53 L.Ed.2d 383 (1977). Again Petitioner relies upon a case where a state, through its regulatory powers, imposes restrictions upon private individuals in the commerce of their products. The Hunt case involved the constitutionality of a North Carolina statute requiring all closed containers of apples sold in the state to be ungraded which caused some Washington state apple shippers extra shipping costs and therefore unnecessarily burdening commerce. A fact situation far different from South Dakota marketing its state owned manufactured cement. Justice Powell, in *Hughes v. Alexandria Scrap Corp., supra*, rejected a similar argument, holding that no independent justification was required of a state if it chose to enter into the market as a purchaser:

> "Nothing in the purposes animating the Commerce Clause forbids a State, in absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."

CONCLUSION

The Court of Appeals correctly held that the Commerce Clause does not limit the State of South Dakota's power to choose whether, to whom, and on what conditions it sells its State owned manufactured cement.

It is therefore respectfully submitted that the Petition for Certiorari should be denied.

February, 1979.

Respectfully submitted,

LYNN, JACKSON, SHULTZ, & LEBRUN, P.C.
Donald R. Shultz
P. O. Box 8110
Rapid City, SD 57701
(605) 342-2592
Attorneys for Respondents